Edwin R. O'Neill, an Individual; O'Neill, Ltd.; Food Equipment Leasing Company; Amalgamated Meat Co.; Fresno Beef Processors, Inc.; Don Turner Corporation; Sierra Pacific Meat Company, Inc.; and J & E Transport, Inc. *and* **United Food and Commercial Workers Union, Local 126, AFL-CIO.** Case 32-CA-3462

May 31, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On April 16, 1982, Administrative Law Judge Jerrold H. Shapiro issued the attached decision. The General Counsel filed an exception, and United Food and Commercial Workers Union, Local 126, AFL-CIO filed exceptions and a brief in support of the exceptions. Respondents Edwin R. O'Neill, O'Neill, Ltd., Amalgamated Meat Co., and Food Equipment Leasing Company (O'Neill entities) filed exceptions and a brief.[1] Respondent J & E Transport, Inc. filed exceptions and a brief.[2]

Respondents Don Turner Corporation, Fresno Beef Processors, Inc., and Sierra Pacific Meat Company, Inc. joined in and adopted the exceptions and briefs in support of exceptions filed by both Respondents O'Neill entities and Respondent J & E Transport. Respondents O'Neill entities joined in and adopted the exception and brief filed by J & E Transport. Respondent J & E Transport adopted the exceptions and supporting briefs filed by "the other named Respondents."

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[3] and to adopt the recommended Order[4] as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondents, Edwin R. O'Neill, an Individual; O'Neill, Ltd.; Food Equipment Leasing Company; Amalgamated Meat Co.; Fresno Beef Processors, Inc.; Don Turner Corporation; Sierra Pacific Meat Company, Inc.; and J & E Transport, Inc., Fresno, California, their officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b).

"(b) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Substitute the following for paragraph 2(a), and renumber the subsequent footnote.

"(a) Pay the employees in the above-described appropriate bargaining unit (i) who were terminated on November 18, 1977, and ordered to be reinstated in Cases 32-CA-848 and 32-CA-928 and (ii) the employees in the appropriate bargaining unit

[1] The request for oral argument made by Respondents Edwin R. O'Neill, O'Neill, Ltd , Food Equipment Leasing Company, and Amalgamated Meat Co is denied, as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

[2] As its brief in the present case, Respondent J & E Transport submitted its May 28, 1982 exceptions brief to Administrative Law Judge Schmidt's decision in the companion consolidated Cases 32-CA-848 and 32-CA-928. In the May 28 brief Respondent J & E Transport took exception, inter alia, to certain of Judge Schmidt's credibility determinations The Board in *O'Neill, Ltd.*, 288 NLRB 1354 (1988), affirmed the judge's credibility determinations.

The May 28 brief also incorporated by reference the other Respondents' exceptions and supporting arguments The Respondents alleged bias on the part of Judge Schmidt. The Board in the companion cases found Judge Schmidt's findings to be free of bias.

[3] We specifically affirm the judge's determination that Respondent Edwin O'Neill is individually liable for the unfair labor practices. See *Las Villas Produce*, 279 NLRB 883 (1986)

In light of the specific facts of this case and the companion cases, the Respondents' bad-faith dealings with Local 126, and Judge Schmidt's finding in the companion cases that the effects bargaining between the Respondents and Local 126 on December 8, 1977, and January 19, 1978, was conducted in bad-faith, we affirm Judge Shapiro's conclusion that Local 126 was reasonable in believing that any effects bargaining between it and the Respondents in 1981 would be futile; "[u]nions need not grovel or undertake apparently futile acts" *Armour & Co.*, 280 NLRB 824 (1986). See also *Metropolitan Teletronics*, 279 NLRB 957 (1986).

[4] In his recommended remedy, Judge Shapiro imposed a limited backpay requirement similar to that required in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968) Judge Shapiro limited the backpay remedy to those meat plant employees actually employed by the Respondents in February 1981.

In their exceptions, the General Counsel and Local 126 request that the Board extend Judge Shapiro's backpay order to the employees in the appropriate unit who were employed at the meat plant and unlawfully discharged in November 1977, in addition to those employees who were discharged when the Respondents closed the meat plant on February 18, 1981 In Cases 32-CA-848 and 32-CA-928 we found that the Respondents unlawfully discharged employees in the appropriate unit in November 1977 and we have ordered that the discriminatees be reinstated Accordingly they would have been employed by the Respondents on February 18, 1981, when the meat plant legitimately ceased operations. The backpay order should also extend to them. Accordingly, we shall modify the Order.

We find no merit in Local 126's request for litigation expenses or other extraordinary remedies. *Heck's Inc*, 215 NLRB 765 (1974). See also *Wellman Industries*, 248 NLRB 325 (1980)

The Respondents' misconduct in the instant case and in the related cases was so egregious and widespread as to demonstrate a general disregard for the employees' fundamental statutory rights, therefore a broad cease-and-desist order is warranted Accordingly, we have substituted broad cease-and-desist language in place of the narrow language the judge used See *Hickmott Foods*, 242 NLRB 1357 (1979)

who were terminated on February 18, 1981, their normal wages for the period set forth in the remedy section of the decision, plus interest as computed in the manner described in *New Horizons for the Retarded.*[8]

"[8] 283 NLRB 1173 (1987). Interest on and after January 1, 1987, shall be computed at the short-term Federal rate for the underpayment of taxes as set out in the 1986 amendment to 26 U S C. § 6621. Interest on amounts accrued prior to, January 1, 1987 (the effective date of the 1986 amendment to 26 U.S C. § 6621), shall ba computed in accordance with *Florida Steel Corp*, 231 NLRB 651 (1977)."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to bargain collectively about the effects of the closure of the O'Neill meat plant with United Food and Commercial Workers Union, Local 126, AFL–CIO as the exclusive representative of all the employees in the following appropriate unit:

> All slaughterhouse and meatpacking employees employed at the O'Neill meat plant in Fresno, California, including kill floor, cooler, boning, Cry-O-Vac, loading and maintenance employees; excluding drivers, salesmen, office clerical, guards and supervisors as defined in the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain collectively with the above-named Union with respect to the effect of closing the O'Neill meat plant in Fresno, California, on the employees who were employed there in the above-described unit, and reduced to writing any agreement reached as a result of such bargaining.

WE WILL pay the employees in the appropriate bargaining unit (i) who were terminated on November 18, 1977, and ordered to be reinstated in Cases 32–CA–848, and 32–CA–928 and those (ii) who were employed at the O'Neill meat plant on February 18, 1981, their normal wages, plus interest, for a period required by the Board's Decision and Order.

> EDWIN R. O'NEILL, AN INDIVIDUAL; O'NEILL, LTD.; FOOD EQUIPMENT LEASING COMPANY; AMALGAMATED MEAT CO.; O'NEILL MEAT COMPANY; FRESNO BEEF PROCESSORS, INC.; DON TURNER CORPORATION; SIERRA PACIFIC MEAT COMPANY, INC.; AND J & E TRANSPORT, INC.

Charles A. Askin, Esq., for the General Counsel.
Howard A. Sagaser, Esq. (Thomas, Snell, Jamison, Russel, Williamson & Asperger), for Respondent J & E Transport, Inc.
George J. Tichy, II and *Michael J. Hogan (Littler, Mendelson, Fastiff & Tichy)*, for the Respondents other than J & E Transport, Inc.
David A. Rosenfeld, Esq. (Van Bourg, Allen Weinbery & Roger), for the Charging Party.

DECISION

STATEMENT OF THE CASE

JERROLD H. SHAPIRO, Administrative Law Judge. On charges filed on March 10, 1981, by Butchers' Union Local No. 126, United Food and Commercial Workers, AFL–CIO (the Union), the General Counsel of the National Labor Relations Board, by the Regional Director for Region 32, issued a complaint and notice of hearing dated April 23, 1981, against Respondents Edwin R. O'Neill, (Respondent O'Neill); O'Neill, Ltd. (Respondent O'Neill, Ltd.); Food Equipment Leasing Company (Respondent FELC); Amalgamated Meat Co. (Respondent Amalgamated); Fresno Beef Processors, Inc. (Respondent Fresno Beef); Don Turner Corporation (Respondent Turner); Sierra Pacific Meat Company, Inc. (Respondent Sierra); and J & E Transport, Inc. (Respondent J & E). The complaint alleges that Respondents engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act), by not affording the Union an opportunity to bargain over the effects on the employees represented by the Union of the closure of a meatpacking plant located in Fresno, California, at 2356 South Fruit Avenue (O'Neill Meat Plant), operated by Respondents. Copies of the charges and complaint and notice of hearing were served on the parties. Respondents filed answers to the complaint, admitting certain factual allegations of the complaint but denying the commission of any unfair labor practices.

Thereafter the parties entered into a stipulation of facts and jointly petitioned the Deputy Chief Administrative Law Judge to designate an administrative law judge for findings of fact, conclusions of law, and an order. The parties stipulated that they waived the hearing before an administrative law judge and that no oral testimony was necessary or desired by any of the parties. The parties also agreed that the charge, complaint, and the stipulation of facts constitute the entire record in this case.

On November 16, 1981, I was designated by the Deputy Chief Administrative Law Judge to prepare and issue a decision in this proceeding and, on that date, issued an order for the filing of briefs by the parties. Thereafter, the General Counsel and Respondents filed briefs in support of their position.

On the basis of the stipulation of facts and the exhibits attached thereto, the briefs and the entire record in this proceeding, I make the following

FINDINGS OF FACT

I. THE BOARD'S JURISDICTION

The parties stipulated that during the 12 months preceding March 10, 1981, the date of the closure of the O'Neill Meat Plant, Respondent FELC, in the course and conduct of its business operations, sold goods and services valued in excess of $50,000 to customers or business enterprises which customers or enterprises themselves met one of the Board's jurisdictional standards, other than the indirect inflow or indirect outflow standard. In view of this and inasmuch as Administrative Law Judge Schmidt, in Cases 32–CA–484 and 32–CA–928, as described infra, has concluded that the Respondents, including Respondent FELC, constitute one employer for purposes of the Act with respect to the operation of the O'Neill Meat Plant, I find that each of the Respondents is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and meets an applicable discretionary Board jurisdictional standard. I further find that it effectuates the policies of the Act for the Board to exercise its jurisdiction over the instant labor dispute.

II. THE LABOR ORGANIZATION INVOLVED

The parties stipulated, and I find, that Butchers' Union Local No. 126, United Food and Commercial Workers, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Stipulated Facts*

1. The background[1]

On November 28, 1977, the facility involved in this proceeding, the O'Neill Meat Plant, was operated by Respondents O'Neill, Ltd., FELC, and Amalgamated,[2] which enterprises constitute a single employer for purposes of the Act in connection with the operation of the O'Neill Meat Plant. In November 1977 the O'Neill Meat Plant was closed and all of its employees terminated. The slaughterhouse and meatpacking employees employed in the plant were represented by the Union and covered by a collective-bargaining agreement between the Union and Respondent Amalgamated effective until December 31, 1979. Prior to the closure, Respondent Amalgamated notified the Union of its intent to close the plant and terminate the employees. Thereafter, representatives of the Union and Amalgamated bargained about the effects of the closure on the employees represented by the Union. These negotiations were conducted by Respondent Amalgamated in bad faith with an object of creating the illusion that Respondent O'Neill was terminating his connection with the operation of the O'Neill Meat Plant when, in fact, O'Neill's intent was to continue operating the plant through other companies in order to escape having to comply with the terms of the Union's collective-bargaining agreement and to rid himself of the Union.

On or about December 12, 1977, the O'Neill Meat Plant reopened under the operation of Respondents Sierra, Fresno Beef, Turner, and J & E who are the alter egos of the former operators of the plant, Respondents O'Neill, Ltd., FELC, and Amalgamated. All the Respondents constitute one employer for purposes of the Act with respect to the operation of the O'Neill Meat Plant.

On reopening the plant in December 1977 the Respondents reemployed only 40 percent of the employees who had been employed in the plant prior to the closing and who were represented by the Union. Respondents also refused to recognize and bargain with the Union as the slaughterhouse and meatpacking employees' collective-bargaining representative, repudiated the Union's collective-bargaining agreement covering these employees, and unilaterally changed their terms and conditions of employment without bargaining with the Union.

Respondents, as found by Administrative Law Judge Schmidt in Cases 32–CA–848 and 32–CA–928, closed the O'Neill Meat Plant in November 1977 and terminated the employees represented by the Union and refused to reemploy 60 percent of these employees when the plant reopened in December 1977 in order to avoid having to recognize and bargain with the Union or comply with the Union's collective-bargaining agreement covering these employees, thereby violating Section 8(a)(3) and (1) of the Act. Judge Schmidt further found that when Respondents reopened the plant in December 1977 they violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union, by repudiating the collective-bargaining agreement with the Union covering the slaughterhouse and meatpacking employees, and by unilaterally changing the terms and conditions of employment of these employees without bargaining with the Union.

[1] The findings of fact in this subsection are based on the findings made by Administrative Law Judge Schmidt in his decision issued on March 30, 1982, in Cases 32–CA–848 and 32–CA–928 The proceeding in those cases involved certain issues of fact and law common to the instant case. The issues of the single employer and/or alter ego relationship of the several Respondents and their obligation to recognize and bargain with the Union as the representative of a unit of employees employed at the O'Neill Meat Plant were fully litigated before Judge Schmidt. The parties stipulated that with respect to the aforesaid "issues the record developed by the parties in Cases 32–CA–848 and 32–CA–928, and the legal conclusions based on that record by Judge Schmidt, as modified by the Board . . or by any appellate court, shall be binding upon all parties in this case."

[2] Respondent Amalgamated was formerly known as the O'Neill Meat Company.

2. The events surrounding the February 18, 1981 closure of the O'Neill Meat Plant

On December 26, 1979, Victor J. Van Bourg, an attorney for the Union, wrote George J. Tichy II, an attorney for Respondent Amalgamated, as follows:

> In 1977 when you were negotiating the alleged shut-down of the O'Neill Meat Company facility, you purported to give notification that O'Neill Meat Company intended to terminate the contract with Local 126, effective December 31, 1979.
>
> In light of the fact that O'Neill Meat Company continues to exist as a joint employer and/or alter-ego with the various respondents named in unfair labor practice cases 32–CA–848 and 32–CA–928, Local 126 does not desire to terminate the collective bargaining agreement, but rather to negotiate a successor agreement with O'Neill Meat Company and the various entities mentioned above.
>
> Please remember your client's obligation under Section 8(d) of the National Labor Relations Act not to make any changes in terms and conditions of employment except in compliance with the law.
>
> Please advise us when you will be available to begin such negotiations.
>
> We are sending copies of this letter to the various attorneys who have entered appearances on behalf of these other entities, all of which are controlled by Mr. O'Neill.

By letter dated January 9, 1980, Attorney Tichy replied to Attorney Van Bourg, as follows:

> You correctly note that O'Neill Meat Company terminated its prior collective bargaining agreement with Butchers Local 126. As you are aware, O'Neill Meat Company, presently known as Amalgamated Meat Company, was forced to go out of business because of economic reasons on November 17, 1977. Since that time the Company has been without employees in an appropriate bargaining unit covered by the now terminated collective bargaining agreement.
>
> I want to state clearly and unequivocally that Amalgamated Meat Company is not involved in any joint employer or alter ego relationship with any Respondent named in unfair labor practices cases Nos. 32–CA–848 and 32–CA–928. Frankly, although I can appreciate your desire for Local 126 to have a collective bargaining agreement covering someone, there is no agreement in effect and no bargaining unit of Amalgamated Meat Company which could be covered by a bargaining relationship with Local 126.
>
> Despite the above facts, we have been authorized by Amalgamated Meat Company to bargain with representatives of Local 126 with the object of reaching an agreement to cover a bargaining unit if one should come into existence. Please contact me so that a mutually agreeable time and place may be arranged for this purpose.
>
> Although there does not appear to be a legal basis requiring bargaining between Amalgamated Meat Company and Local 126, Amalgamated Meat Company continues to approach its dealings with Local 126 in the spirit of good faith and cooperation.

The Union did not answer this letter.

On February 18, 1981, the O'Neill Meat Plant ceased operation and all the employees employed at that facility, including the slaughterhouse and meatpacking employees, were discharged.

On February 19, 1981, during the course of a meeting about matters not relevant to the instant case, Michael Hogan, an attorney for Respondents O'Neill, O'Neill, Ltd., and Amalgamated, asked Marcello Salcido, the Union's executive secretary-treasurer, "whether [Salcido] wished to negotiate concerning the effects of the closure of the slaughterhouse facility." Salcido replied, "He did not wish to discuss it at that time, but that he would make some contact with Hogan at some future time." Respondents had previously not afforded the Union an opportunity to negotiate about the effects of the closure. Salcido did not contact Hogan about this matter.

On February 24, 1981, Salcido, on behalf of the Union, wrote identical letters to Respondents O'Neill Ltd., O'Neill, Amalgamated, and Turner which read as follows:

> [The Union] would like to meet with you to discuss the decision to close your slaughterhouse and the effects upon the employees. We ask that you return to the status quo until the negotiations are complete. Your decision to close came as a complete surprise without opportunity for any bargaining.
>
> Please advise as to what dates you can be available to meet.

Respondent Turner responded by letter dated March 4, 1981, from its attorney, William A. Quinlan, which in pertinent part stated that Respondent Turner had nocontractual or collective-bargaining relationship with the Union and was under no duty to engage in collective bargaining with the Union. Respondents O'Neill, O'Neill, Ltd. and Amalgamated responded by letter dated March 12, 1981, from their attorney, George A. Tichy II, which read as follows:

> Your letters of February 24, 1981, addressed to Edwin R. O'Neill: O'Neill Meat Company, and O'Neill, Ltd. have been referred to me for response. As you are aware, neither Mr. O'Neill nor any company or organization with which he is associated with has any bargaining relationship with Local No. 126. Furthermore, none of these entities employ employees who are represented by your union. Under the circumstances, there is no proper basis upon which your union can claim a right to engage in negotiations with Mr. O'Neill or any entity with which he is associated.
>
> However, without waiving any position which Mr. O'Neill or any O'Neill entity has maintained concerning the absence of a bargaining relationship

> with your union, a representative of Mr. O'Neill and the companies is willing to meet with you.
>
> Please contact me if you wish to meet. Of course, it is understood that neither Mr. O'Neill nor any company with which he is or has been associated will by attending this meeting waive any legal position which they have advanced in NLRB Cases 32–CA–848 and 32–CA–928.

On March 16, 1981, Attorney Tichy spoke to Union Representative Salcido and "mentioned to Salcido that he [Tichy] had sent a letter to [Salcido] in reply to Salcido's letter of February 24, 1981" and asked Salcido "when they could meet for negotiations." Salcido answered that "he would have to refer that question to his attorneys."

Following the aforesaid March 16 conversation between Tichy and Salcido no representative of the Union contacted any representative of the Respondents in writing or in person for the purpose of entering into negotiations about the effects on the employees represented by the Union of the February 18, 1981 closure of the O'Neill Meat Plant. The Union refused to accept Respondents' invitation to bargain about the effects of the plant closure because in the Union's view such a request would be futile in light of the terms set forth in the aforesaid letters of Respondents dated March 4 and 12, 1981.

B. *Discussion and Conclusionary Findings*

An employer whose employees are represented by a labor organization is obliged by Section 8(a)(5) of the Act to bargain with that union about the effects on the employees of the employer's decision to close its business. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681 (1981). In the instant case, as found by Judge Schmidt in Cases 32–CA–848 and 32–CA–928, Respondents operated the O'Neill Meat Plant as a single employer and because of this each Respondent was obligated to recognize and bargain with the Union as the exclusive collective-bargaining representative of the plant's slaughterhouse and meatpacking employees. Accordingly, Respondents had a duty to bargain with the Union about the effects on these employees of the February 18, 1981 closure of the O'Neill Meat Plant. Respondents take the position that even if the Board and a court of appeals affirms Judge Schmidt's decision in this respect, that Respondents met their obligation to bargain with the Union about the effects of the closure by virtue of the fact that subsequent to the closure Respondents invited the Union to bargain about the effects of the closure and the Union rejected this offer. The General Counsel takes the position that Respondents' invitation to the Union to bargain about the effects of the closure was untimely because it was made only after the plant had been closed and the employees terminated.

In general, when an employer decides to take action that significantly impacts on employees' terms or conditions or tenure of employment, the employer must afford the union an opportunity to bargain in advance of the actual implementation of the employer's decision. See *NLRB v. Katz*, 369 U.S. 736, 747 (1962) ("unilateral action by an employer without *prior* discussion with the union [amounts] to a refusal to negotiate . . . . [emphasis supplied]"); *Machinists v. Northeast Airlines*, 473 F.2d 549, 557 (1st Cir. 1972) ("A company must give prior notice to the employees' representatives of any managerial decision which will have an impact on employment security and conditions so that the union will have an opportunity *before the change takes place* to negotiate concerning how the employees are to be protected [emphasis supplied]"); *Ladies' Garment Workers v. NLRB*, 463 F.2d 907, 919 (D.C. Cir. 1972) ("notice to be effective must be given sufficiently in advance of actual implementation of a decision to allow reasonable scope for bargaining.") Consistent with this principle, in cases dealing with the duty of an employer to bargain with a union about the effects on employees of the employer's decision to close its business, the Board has found a violation of Section 8(a)(5) of the Act even though the employer, after the plant has been closed and the employees terminated, invites the union to bargain over the effects of the closure. *Transmarine Navigation Corp.*, 170 NLRB 389 (1968); *Thompson Transport Co.*, 184 NLRB 38 (1970); *National Terminal Baking Corp.*, 190 NLRB 465, 466 (1971). As the Board stated in *Stone & Thomas*,[3] "meaningful bargaining over effects can only occur prior to the employer's making and acting upon its decision." Likewise in discussing an employer's obligation under Section 8(a)(5) to bargain over the effects on employees of a plant closure the Supreme Court has recently stated, "under Section 8(a)(5), bargaining over the effects of a decision must be conducted in a meaningful manner and *at a meaningful time* [emphasis supplied]." See *First National Maintenance Corp. v. NLRB*, 452 U.S. at 681–682.

Respondents cite *Triplex Oil Refining Division*, 194 NLRB 500 (1971),[4] in support of the contention that Respondents' invitation to the Union to bargain over the effects of the decision to close the O'Neill Meat Plant fulfilled Respondents' bargaining obligation under Section 8(a)(5), despite the fact that the invitation was issued after the actual closure and termination of the employees. In *Triplex Oil Refining* the Board concluded:

> [A] representative of Respondent, asked an official of the Union to come down to the plant after the closing to make sure the terminated employees were satisfied with the benefits each received under the contract. The union official did so, and thus had an opportunity to seek negotiations on the effects of the closing. As the Respondent fulfilled its bargaining obligation by affording the Union this opportunity, it cannot be faulted for the Union's failure to present any demands.

The *Triplex Oil Refining* decision, insofar as it stands for the proposition that an employer can satisfy its obligation under Section 8(a)(5) to bargain over the effects of a

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[3] 221 NLRB 573, 576 (1975).

[4] *U.S. Contractors*, 257 NLRB 1180 (1981), also cited by Respondents is completely inapposite to the instant situation. There, the respondent-employer *prior* to closing its business operation, met with the union and was prepared to bargain with the union about the effects of the closure, but the union, by virtue of its own conduct, precluded such bargaining

plant closure by inviting the union to bargain after the plant has been closed and the employees terminated, stands alone, and is inconsistent with the great weight of authority set forth above, in particular with the Supreme Court's admonition in *First National Maintenance* that "under 8(a)(5), bargaining over the effects of a decision must be conducted . . . at a meaningful time." In any event, the instant case is significantly different from *Triplex Oil Refining*. There the employer recognized the union as the employees' collective-bargaining representative and the union had no reason to doubt that the employer's invitation to bargain was expressed in good faith. In the instant case, Respondents, by their own conduct, created a situation calculated to cause the Union to believe that Respondents did not intend to bargain in good faith over the effects of the decision to close the meat plant and that any attempt by the Union to secure good-faith bargaining would be futile. Thus, while inviting the Union to bargain over the effects of the closure, the Respondents, in the same breath, informed the Union that the Respondents were still refusing to recognize and bargain with the Union as the employees' exclusive collective-bargaining representative. Respondents took the position that they were not obligated to bargain with the Union about anything, including the effects of the closure on the employees, since the Union did not represent the employees. In this situation the Union was reasonable in believing that it would have been futile to accept Respondents' after-the-fact invitation to bargain about the effects of the plant closure. For, "an employer who takes the erroneous position that a particular subject matter is not bargainable can hardly approach the discussion of this subject with an open mind and a willingness to reach an agreement." *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 136 (1st Cir. 1953). Moreover, as Judge Schmidt found in Cases 32–CA–848 and 32–CA–928, Respondents had previously bargained in bad faith with the Union over the effects of the previous closure of the O'Neill Meat Plant in November 1977, and when the plant was reopened in December 1977 Respondents repudiated the Union's collective-bargaining agreement, unilaterally changed the terms and conditions of employment of the employees represented by the Union, refused to bargain with the Union, and, in order to avoid recognizing and bargaining with the Union, refused to reemploy the majority of the employees represented by the Union who were employed at the meat plant prior to the closure. Under the foregoing circumstances, the Union's failure to accept Respondents' invitation to engage in effects bargaining after the plant was already closed and the employees terminated was the foreseeable result of Respondents' own illegal conduct.[5]

Based on the foregoing, I find that Respondents violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union with respect to the effects on the employees represented by the Union of Respondents' closure on February 18, 1981, of the O'Neill Meat Plant located at 2356 South Fruit Avenue, Fresno, California.[6]

Respondent O'Neill, an individual, argues that he has been improperly named as an individual respondent in this proceeding. In Cases 32–CA–848 and 32–CA–928, Judge Schmidt concluded that Respondent O'Neill was the alter ego of Respondent O'Neill, Ltd. and its subsidiaries and that Respondent O'Neill was individually responsible for remedying the unfair labor practices found to have been committed in that proceeding. In reaching this conclusion, Judge Schmidt found that Respondent O'Neill was the dominant figure in the formulation of the illegal scheme whereby the O'Neill Meat Plant closed in November and reopened in December 1977 under the auspices of new operators in order to avoid having to continue to comply with the Union's collective-bargaining agreement and to get rid of the Union and, further, found that the new business enterprises that had taken over the operation of the meat plant when it reopened were mere fronts for Respondent O'Neill and that, in the absence of moneys from Respondent O'Neill and his enterprises, the new enterprises were unable to operate the meat plant. In view of these circumstances, Judge Schmidt concluded that in the absence of imposing liability on Respondent O'Neill for the unfair labor practices committed therein, it was unlikely an effective remedy could be fashioned. In the instant proceeding there is no evidence that Respondent O'Neill's role in the operation of the meat plant has changed in any way. In other words, while certain of the Respondents appear to be the operators of the meat company, it is Respondent O'Neill who is the dominant figure and that without the infusion of his moneys the plant could not operate. Since this state of affairs came about because of Respondent O'Neill's illegal scheme to get rid of the Union, I find that, as was the case in Cases 32–CA–848 and 32–CA–928, Respondent O'Neill was properly named as one of the Respondents and is responsible for remedying the unfair labor practices.

CONCLUSIONS OF LAW

1. During the time material, Respondents Edwin R. O'Neill; O'Neill: Ltd.; Food Equipment Leasing Company Amalgamated Meat Co.; Fresno Beef Processors, Inc.; Don Turner Corporation; Sierra Pacific Meat Company, Inc.; and J & E Transport, Inc. have been a single employer for purposes of the Act in connection with the operation of the O'Neill Meat Plant and constitute a single employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union, Butchers' Union Local No. 126, United Food and Commercial Workers, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All slaughterhouse and meatpacking employees employed at the O'Neill Meat plant in Fresno, California, including kill floor, cooler, boning, Cry-O-Vac, loading,

[5] For the same reasons I reject Respondents' argument that the Union waived any representational claim by its failure to engage in negotiations with Respondents following Respondents' December 26, 1979 letter agreeing to bargain with the Union for a collective-bargaining agreement "to cover a bargaining unit if one should come into existence."

[6] Respondents' argument that Sec. 10(b) of the Act bars this proceeding is without merit inasmuch as the charge was filed on March 10, 1981, well within 6 months of the plant closure that took place on February 18, 1981.

and maintenance employees; excluding drivers, salesmen, office clericals, guards and supervisors as defined in the Act, constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. During the time material, the Union has been the exclusive representative of the employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing to bargain with the Union about the effects on the employees of the closing of the O'Neill Meat Plant on February 18, 1981, Respondents engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondents have engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, I shall recommend that Respondents cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

As a result of the Respondents' unlawful failure to bargain about the effects of the closing of the O'Neill Meat Plant, the displaced employees represented by the Union have been denied an opportunity to bargain through their collective-bargaining representative at a time when Respondent was still in need of their services, and a measure of balanced bargaining power existed. Meaningful bargaining cannot be assured until some measure of economic strength is restored to the Union. A bargaining order, therefore, cannot serve as an adequate remedy for unfair labor practices committed.

Accordingly, I deem it necessary, in order to effectuate the purposes of the Act, to require the Respondents to bargain with the Union concerning the effects of the closing of the O'Neill Meat Plant on its employees, and shall accompany this recommended Order with a limited backpay requirement designed both to make whole the employees for losses suffered as a result of the violation and to recreate in some practical manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondents. I shall do so in this case by requiring Respondents to pay backpay to its employees in the manner similar to that required in *Transmarine Navigation Corp.*, 170 NLRB 389. Thus, the Respondents shall pay employees backpay at the rate of their normal wages when last in Respondent's employ from 5 days after the date of this decision until the occurrence of the earliest of the following conditions: (1) the date the Respondents bargain to agreement with the Union on those subjects pertaining to the effects of the plant shutdown on its employees; (2) a bona fide impasse in bargaining; (3) the failure of the Union to request bargaining within 5 days of this decision, or commence negotiations within 5 days of Respondents' notice of its desire to bargain with the Union or (4) the subsequent failure of the Union to bargain in good faith; but in no event shall the sum paid to any of these employees exceed the amount he or she would have earned as wages from February 18, 1981, the date Respondents closed the O'Neill Meat Plant, to the time he or she secured equivalent employment elsewhere, or the date on which Respondents shall have offered to bargain, whichever occurs sooner; provided, however, that in no event shall this sum be less than these employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

Respondents, Edwin R. O'Neill, an Individual; O'Neill, Ltd.; Food Equipment Leasing Company; Amalgamated Meat Co.; Fresno Beef Processors, Inc.; Don Turner Corporation; Sierra Pacific Meat Company, Inc.; and J & E Transport, Inc.; Fresno, California, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively concerning the effects of the closure of the O'Neill Meat Plant on employees with Butchers' Union Local No. 126, United Food and Commercial Workers, AFL–CIO, as the exclusive representative of all employees in the following appropriate unit:

> All slaughterhouse and meatpacking employees employed at the O'Neill Meat Plant in Fresno, California, including kill floor, cooler, boning, Cry-O-Vac, loading and maintenance employees; excluding drivers, salesmen, office clericals, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Pay the terminated employees in the above-described appropriate bargaining unit their normal wages for the period set forth in the remedy section of this decision, plus interest as computed in *Florida Steel Corp.*, 231 NLRB 651 (1977).

(b) On request, bargain collectively with the above-named labor organization with respect to the effects on the employees in the appropriate bargaining unit of the closure of the O'Neill Meat Plant, and reduce into writing any agreement reached as the result of such bargaining.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Mail an exact copy of the attached notice marked "Appendix"[8] to Butchers' Union Local No. 126, United Food and Commercial Workers, AFL–CIO, and to all the employees who were employed at the O'Neill Meat Plant on February 18, 1981. Copies of said notice on forms provided by the Regional Director for Region 32, after being signed by Respondents' authorized representatives, shall be mailed immediately on request as hereinabove directed.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."